



## POLICE DEPARTMENT

July 18, 2019

In the Matter of the Charges and Specifications : Case Nos.  
- against - :

Police Officer Robert Rodriguez : 2018-18541  
Tax Registry No. 926015 :  
45 Precinct :

Police Officer Thomas Nicoletti : 2018-18534  
Tax Registry No. 925830 :  
45 Precinct :

X  
At: Police Headquarters  
One Police Plaza  
New York, NY 10038

Before: Honorable David S. Weisel  
Assistant Deputy Commissioner Trials

APPEARANCES:

For the CCRB: Hamilton Lee & Ifeamaaka Igbokwe, Esqs.  
Civilian Complaint Review Board  
100 Church Street, 10th Floor  
New York, NY 10007

For Respondents: John P. Tynan, Esq.  
Worth, Longworth & London, LLP  
111 John Street, Suite 640  
New York, NY 10038

To:

HONORABLE JAMES P. O'NEILL  
POLICE COMMISSIONER  
ONE POLICE PLAZA  
NEW YORK, NEW YORK 10038

POLICE OFFICER ROBERT RODRIGUEZ  
POLICE OFFICER THOMAS NICOLETTI

## CHARGES AND SPECIFICATIONS

### Disciplinary Case No. 2018-18541

1. Police Officer Robert Rodriguez, on or about May 18, 2017, at approximately 2130, while assigned to 045 PCT and on duty, in the vicinity of [REDACTED] Bronx County, wrongfully used force, in that he pointed his gun at Individual 1 and Individual 2 without police necessity.

P.G. 221-01, Page 2, Prohibition 11 USE OF FORCE  
P.G. 221-01 USE OF FORCE

2. Police Officer Robert Rodriguez, on or about May 18, 2017, at approximately 2130, while assigned to 045 PCT and on duty, in the vicinity of [REDACTED] Bronx County, engaged in conduct prejudicial to the good order, efficiency, or discipline of the New York City Police Department, in that he threatened Individual 1 and Individual 2 with the use of force by stating, in sum and substance, "I'm going to shoot you in your face," without sufficient legal authority.

P.G. 203-10, Page 1, Paragraph 5 PUBLIC CONTACT - PROHIBITED  
a. CONDUCT

3. Police Officer Robert Rodriguez, on or about May 18, 2017, at approximately 2130, while assigned to 045 PCT and on duty, in the vicinity of [REDACTED] Bronx County, spoke discourteously to Individual 1 and Individual 2, in that he used profanities towards them without sufficient legal authority.

P.G. 203-09, Page 1, Paragraph 2 PUBLIC CONTACT – GENERAL

4. Police Officer Robert Rodriguez, on or about May 18, 2017, at approximately 2130, while assigned to 045 PCT and on duty, in the vicinity of [REDACTED] Bronx County, abused his authority as a member of the New York City Police Department, in that he searched the vehicle in which Individual 1 and Individual 2 were occupants without sufficient legal authority.

P.G. 212-11, Page 5, Paragraph 23 INVESTIGATIVE ENCOUNTERS

5. Police Officer Robert Rodriguez, on or about May 18, 2017, at approximately 2130, while assigned to 045 PCT and on duty, in the vicinity of [REDACTED] Bronx County, abused his authority as a member of the New York City Police Department, in that he detained Mr. Individual 1 and Mr. Individual 2 without sufficient legal authority.

P.G. 212-11, Page 4, Paragraph 16 INVESTIGATIVE ENCOUNTERS

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6. Police Officer Robert Rodriguez, on or about May 18, 2017, at approximately 2130, while assigned to 045 PCT and on duty, in the vicinity of [REDACTED], Bronx County, engaged in conduct prejudicial to the good order, efficiency, or discipline of the New York City Police Department, in that he threatened to issue a summons to Individual 1 without sufficient legal authority.

P.G. 203-10, Page 1, Paragraph 5 PUBLIC CONTACT - GENERAL

7. Police Officer Robert Rodriguez, on or about May 18, 2017, at approximately 2130, while assigned to 045 PCT and on duty, in the vicinity of [REDACTED], Bronx County, abused his authority as a member of the New York City Police Department, in that he refused to provide his name to Individual 2 without sufficient legal authority.

P.G. 203-09, Page 1, Paragraph 1 PUBLIC CONTACT - GENERAL

8. Police Officer Robert Rodriguez, on or about May 18, 2017, at approximately 2130, while assigned to 045 PCT and on duty, in the vicinity of [REDACTED], Bronx County, abused his authority as a member of the New York City Police Department, in that he seized [REDACTED]'s property without sufficient legal authority.

P.G. 203-10, Page 1, Paragraph 5 PUBLIC CONTACT - GENERAL

Disciplinary Case No. 2018-18534

1. Police Officer Thomas Nicoletti, on or about May 18, 2017, at approximately 2130, while assigned to 045 PCT and on duty, in the vicinity of [REDACTED], Bronx County, engaged in conduct prejudicial to the good order, efficiency, or discipline of the New York City Police Department, in that he stated, in sum and substance, "If he [Individual 1] gets out of control, shoot him in the back of the fucking head," without sufficient legal authority.

P.G. 203-10, Page 1, Paragraph 5 PUBLIC CONTACT -  
PROHIBITED CONDUCT

2. Police Officer Thomas Nicoletti, on or about May 18, 2017, at approximately 2130, while assigned to 045 PCT and on duty, in the vicinity of [REDACTED], Bronx County, spoke discourteously to Individual 2 and Individual 1, in that he used profanities towards them without sufficient legal authority.

P.G. 203-09, Page 1, Paragraph 2 PUBLIC CONTACT - GENERAL

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3. Police Officer Thomas Nicoletti, on or about May 18, 2017, at approximately 2130, while assigned to 045 PCT and on duty, in the vicinity of [REDACTED] [REDACTED] [REDACTED] [REDACTED], Bronx County, abused his authority as a member of the New York City Police Department, in that he detained Individual 1 and Individual 2 without sufficient legal authority.

P.G. 212-11, Page 4, Paragraph 16

## INVESTIGATIVE ENCOUNTERS

### REPORT AND RECOMMENDATION

The above-named members of the Department appeared before the Court on April 29, 2019. Respondents, through their counsel, entered pleas of Not Guilty to the subject charges. The Civilian Complaint Review Board presented the interview transcripts of the civilian complainants, who were uncooperative at the time of the trial. Respondents testified on their own behalf. A stenographic transcript of the trial record has been prepared and is available for the Police Commissioner's review.

Having carefully reviewed all testimony and evidence in this matter the Court finds as follows:

**Respondent Rodriguez** is found Guilty of Specification Nos. 2, 3, 5 and 8, and Not Guilty of Specification Nos. 1, 4, 6 and 7.

**Respondent Nicoletti** is found Guilty as charged.

### ANALYSIS

#### Introduction

It is undisputed that on May 18, 2017, Individual 1 was driving at a high rate of speed on the highway with his cousin, Individual 2, in the car. Respondents saw Individual 1 speeding, pursued him, and got him to pull over. While the patrol vehicle and [REDACTED] s car were stopped on the side of the road, Respondent Rodriguez entered [REDACTED] s car to direct him to a spot off the highway. Throughout the incident, Respondents both used vulgar language. Respondent Rodriguez made several profane

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statements and threatened to shoot Individual 1. Additionally, Respondent Nicoletti told Respondent Rodriguez to shoot the individuals if they caused him any problems while he was inside their car.

Individual 1 was issued several summonses and was made to call a tow truck at his own expense. Individual 1 and Individual 2 made a civilian complaint. In dispute is whether Respondents' coarse language and threats constitute actionable misconduct or a means of ensuring compliance; whether Respondent Rodriguez wrongfully pointed his gun at the complainants; whether Respondents unlawfully searched and seized [REDACTED]'s vehicle when Respondent Rodriguez entered it or had it towed; and whether Respondents unlawfully detained the complainants.

#### Facts

**RESPONDENT RODRIGUEZ** testified that on May 18, 2017, he was in the vicinity of [REDACTED] with his partner, Respondent Nicoletti. Respondent Nicoletti used laser-assisted radar (lidar) to detect Individual 1 driving at approximately 107 miles per hour in "moderate to heavy" traffic. Even relative to "people traveling at the maximum speed," Individual 1 "was going around them at an astronomically fast" pace. Respondent Rodriguez also observed a white truck, either a pickup truck or tow truck, in the vicinity. He was "not sure if it was chasing them at that time or racing them." Respondents decided to chase the vehicle "that seemed most attainable" (Tr. 18-20). Respondent Nicoletti "decided that [REDACTED] Honda was the most acquirable because the other vehicle was pulling away." Respondents used tandem lights, a loud siren and a percussion device known as a rumbler that drivers can feel even if they cannot hear the siren. The Honda took a while to stop and continued swerving through the vehicles.

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Respondent Nicoletti cut in front of the vehicle in order to get the vehicle to stop. Respondent Rodriguez estimated that 60 to 90 seconds elapsed between starting to use the sirens and getting the Honda to stop. The Honda stopped in the right lane even though there was room on the shoulder and the area to the side of the shoulder. Respondent Rodriguez worried that the position of the cars was very dangerous and could lead to his being hit by another vehicle (Tr. 21-23, 41).

Respondent Rodriguez did not know why the car was using such speed. Because of the uncertainty, he approached the vehicle with his firearm out and pointed down. He demanded to see their hands. He approached the driver's side of the vehicle and re-holstered his firearm as soon as he saw the individuals' hands. Respondent Rodriguez denied ever raising his firearm to chest level or even ready level. Respondent Rodriguez asked the driver, in a loud voice, what he was doing. Respondent Rodriguez admitted that he used profanity, but maintained it was to gain "forceful compliance." He also said, "Dude, I could have shot you," but denied saying, "I'm going to shoot you." He also admitted that he "probably" told Individual 1 that he was "out of his fucking mind," and acknowledged referring to [REDACTED] s claim that his [REDACTED] had a broken arm as "fucking bullshit." Finally, Respondent Rodriguez acknowledged that Respondent Nicoletti told him, "If they get out of control, shoot them in the back of the fucking head" after he entered [REDACTED] s car. Respondent Rodriguez admitted that the civilians were not disrespectful while he was in their car (Tr. 49-56). (Tr. 24-26, 45).

As Respondent Rodriguez was talking to the driver, a tractor trailer drove by "approximately two feet" from him, which made him very nervous. Respondent acknowledged that he never blocked off traffic or set up traffic flares. Nevertheless, for his

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safety, he entered the back of [REDACTED]'s vehicle. He did not receive consent to do so and had never done anything similar before in his 19 years of service. He instructed Individual 1 to pull off to a safe portion of roadway at the intersection of Bruckner Boulevard and Brush Avenue. The drive took approximately two minutes. He kept his gun holstered with his hand on the holster. Respondent Rodriguez believed that Respondent Nicoletti was following in the police vehicle while Respondent directed Individual 1 (Tr. 26-29, 41, 59).

Respondent Rodriguez also admitted that when [REDACTED]s car pulled off the road, Respondent Rodriguez took his keys, exited the vehicle and placed the keys on the roof while the men waited inside. Respondents deliberated about whether to arrest the driver and passenger for reckless endangerment to life, but ultimately Respondent Nicoletti decided to issue summonses instead. Respondent Nicoletti spent "maybe an hour" writing out approximately nine or ten summonses. Respondent Rodriguez told Individual 1 that he might see him driving recklessly in the future and that if so, he would write summonses. He did not feel that Individual 1 could be trusted to drive the vehicle, so he "told him to call the tow truck of his choice" because "he couldn't be trusted to drive away at that point." A tow truck driver, whom Respondent Rodriguez recognized from prior interactions, arrived and took the vehicle away. Respondent Rodriguez told the tow truck driver to "make sure" that Individual 1 did not drive again for the rest of the night. Respondents then left (Tr. 29-34, 61-62).

On cross examination, Respondent Rodriguez viewed the video of his encounter with Individual 1. He acknowledged that it was his voice telling Individual 1 to "keep the dog in the car." Individual 1 told him, "I wasn't trying to run from you."

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**RESPONDENT NICOLETTI** testified that on May 18, 2017, he was assigned to speed enforcement with his partner, Respondent Rodriguez. He observed a light-colored Honda that he believed was traveling at 105 miles per hour. The lidar reading was 107 miles per hour. The Honda was driving with two other vehicles. Respondent Nicoletti waited before using his lights and sirens, because in his experience, doing so immediately makes drivers travel even faster and become more difficult to apprehend. He instead used his lights, sirens and rumbler "at a reasonable distance where the motorists could see me and pull over." After some time, the vehicle pulled over and Respondent Nicoletti had to pull his vehicle, a marked car, at a 45-degree angle to make the Honda stop. He conceded this was not normal practice (Tr. 67-71). Respondent Nicoletti walked to the driver's side of the Honda, where Respondent Rodriguez was already standing. Respondent Nicoletti needed to raise his voice over the passing traffic. Once his partner entered the Honda, Respondent Nicoletti let the car pass him and he followed in his patrol vehicle. He admitted that before driving off, he told Respondent Rodriguez, "If they get out of hand, shoot them in the fucking head." He explained that he meant, "If they drove off or he needs to protect himself from the back seat" (Tr. 71-74).

Respondent Nicoletti spent about an hour checking for warrants and I-cards, and writing the summonses, which were all issued to Individual 1 because he was the driver (Tr. 74-77, 86).

The complainants refused to cooperate with the CCRB by the time of trial. Instead, the CCRB submitted transcripts of their respective interviews with investigators, which both took place on June 29, 2017.

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Individual 1 asserted that the patrol vehicle "cut [him] off from the front" while he was in the process of slowing down. The officers did not use a speaker to address him to tell him to pull over. Individual 1 alleged that Respondent Rodriguez jumped out of the patrol vehicle before it fully stopped, told him to keep his hands in the air and pointed a gun at him. Respondent Rodriguez eventually held the gun to his side before approaching the side of [REDACTED]'s car. One officer said he wanted Individual 1 off the highway and the other officer, whom Individual 1 identified as Respondent Rodriguez, entered the car. He "put the gun right behind my head" and Individual 1 "felt the pressure" of it on his head. Individual 1 did not know what to expect and wondered if he would be shot. He wanted to park in a visible area but instead was made to pull into an area "where there was no lights no nothing."

Respondent Rodriguez told him that he was under arrest and that he could not call his wife. Once Individual 1 had pulled over, Respondent Rodriguez told him to give up his keys and "promise[d]" that he would lose his driving license (CCRB Ex. 1: 4-6, 23, 26, 35-44, 47, 78).

While Individual 1 and Individual 2 were standing outside the vehicle, Individual 2 suggested that he could drive the car, and Respondent Rodriguez profanely told him that he would not allow him to do so. Individual 2 asked Respondent Rodriguez, "Why you got to be so mean for?" and Respondent Rodriguez answered, "[J]ust shut the fuck up." Respondent Rodriguez made disparaging, profane comments about the tires on [REDACTED]'s car and told him that he was "fucking lucky" not to be arrested because Respondent Rodriguez had "something to do tomorrow." Respondent Nicoletti's only "reckless" statement was the one about shooting the motorists in the head (CCRB Ex. 1: 48-53, 67-68).

Individual 1 was instructed to call a tow truck. While they were waiting, Individual 2 asked Respondent Rodriguez for his full name and his partner's full name, but "he refused

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to answer...he ignored it." Individual 1 had learned Respondent Rodriguez's last name earlier by reading it off his shirt. Respondent Rodriguez then took Individual 2's ID and photographed it. After some time, Respondent Rodriguez instructed the tow truck driver, who was a friend of Individual 1, to "take my car and do whatever he want with [it] like...He could crash it or throw it at the end of the river in Soundview." Respondent Rodriguez then told Individual 1 to walk. Before leaving, Respondent Rodriguez told Individual 1 that he would look for his car in the future and "follow me until I make every fucking mistake that he could tag me for" to ensure that he would lose his license. Eventually, Individual 1 rode away from the scene in the tow truck and the driver quickly returned the car to Individual 1 (CCRB Ex. 1: 7-10, 28, 55-66).

Individual 1 acknowledged to investigators that he had been driving aggressively and "willing out" and estimated his speed as 90 to 95 miles per hour. He also admitted to giving Respondent Rodriguez a "sob story" about his [REDACTED] to explain his speeding (CCRB Ex. 1: 20-21, 33, 72-73).

Individual 2 told investigators that he and Individual 1 were driving a "little fast" (he estimated 70 miles per hour) when the police started "telling us to basically move over." The police approached with "their guns out." As Individual 1 and the police were pulling over, Respondent Rodriguez stuck his gun out the police vehicle's window. Individual 2 said that both officers pointed their weapons at them. Once Respondents left their vehicle, they put their weapons away. Respondent Rodriguez told them to "keep your hands up or I'll fucking shoot you." As Individual 2 was putting his hands out the car window, Respondent Nicoletti was bending his fingers down, essentially wrapping them around the window. After approximately ten minutes on the side of the road, Respondent

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Rodriguez entered the car and told Individual 1 to pull off the highway where it was safer. Respondent Nicoletti said, "Blow his fucking head off" if Individual 1 were to do anything wrong. Once he entered the car, Respondent Rodriguez "had his gun up the whole time," pointed at Individual 1. Respondent Rodriguez told Individual 2, "Your job is to hold that fucking dog" and pointed his gun at him (CCRB Ex. 2: 4-6, 26-36, 42-47, 56-58, 69).

Once the car was off the highway, "they took our phones, they made us put all our phones on the...hood of the car. Took a picture of my ID too." Individual 2 asked why Respondent Rodriguez photographed his ID and asked for Respondent Rodriguez's name but he simply answered with a "hmm" and "just laughed." Individual 2 "didn't want to say nothing stupid...because they have their guns out." Respondent Rodriguez told the complainants to call a tow truck company or he would have "another company" come to pick up their car. Individual 2 offered to drive Individual 1's car home but Respondent Rodriguez said, "No, I don't trust you." A tow truck came 15 minutes later, Respondent Rodriguez gave Individual 1 the summonses and the complainants rode away inside the tow truck. (CCRB Ex. 2: 7-8, 71-81).

Individual 2 equivocated when asked whether he and Individual 1 were racing others and said that they were just "driving a little quick" rather than racing with the tow trucks. Regarding Individual 1's claim that his [REDACTED] had broken her arm, Individual 2 admitted, "Well, she...did hurt her arm but...he just like, used that as an excuse." (CCRB Ex. 2: 9, 50-53, 89)

CCRB submitted into evidence a **VIDEO OF THE INCIDENT** (CCRB Ex. 3), recorded by Individual 2. Sirens become audible, and Individual 2 can be heard asking, "That's for us?" Individual 1 replies, "Yeah." (CCRB Ex. 3: 1:20-1:31). Almost immediately, a third voice can

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be heard saying, "Hands up...hands out the windows" (*Id.* 1:35-141). Individual 1 says that he was driving fast because of concerns about his ██████████ having broken her arm. Respondents tell the complainants to put their hands out the windows slowly (*Id.* 2:05-2:16). Respondent Rodriguez appears to say, "Or I'm gonna shoot you in your face." The beginning of the sentence is cut off by Individual 1 saying that "there's nothing in the car" (*Id.* 2:17-2:19). After asking for registration, Respondent Rodriguez says, "You're out of your fucking mind, bro. Let me explain something to you: a broken fucking arm is bullshit. You understand that?" Individual 1 replies, "I respect that." Respondent Rodriguez continues, "You see the people out here? You could have fucking killed them." He continues telling Individual 1 that the people surrounding them on the highway matter (*Id.* 2:25-2:50).

Respondent Nicoletti tells Individual 1 to get off at the next exit, and Respondent Rodriguez says, "I got a better idea. I'm gonna ride with them." A door can be heard closing. Respondent Nicoletti says, "He gets out of control, you shoot him in the back of the fucking head" and Respondent Rodriguez says, "Yeah" (*Id.* 2:51-3:07). While driving, Individual 1 says, "I really apologize, bro, honestly." Respondent Rodriguez answers, "I really don't give a fuck, dude." Individual 1 tells Individual 2 to call someone, and Respondent Rodriguez says, "Don't call anybody. Hang up the phone. You're not free at this point. You understand that?" (*Id.* 3:20-3:37). The recording ends after Individual 1 parks and Respondent Rodriguez orders him to hand back the keys (*Id.* 4:40-4:44).

### **Analysis**

#### *Language*

Respondent Rodriguez's Specification No. 3 and Respondent Nicoletti's Specification No. 2 charge that they spoke discourteously to the complainants by using profanity. It is

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undisputed that Respondents used profane language several times when speaking to the complainants. The Patrol Guide calls for uniformed members to interact with the public "in a professional manner," and using vulgar words deviates from that standard. This tribunal, however, has recognized that profane language does not always rise to the level of misconduct, due to the intensity of the situation. See, e.g. *Case No. 2015-14379* (May 23, 2017) (use of profanity by officer during stressful street arrest did not constitute actionable misconduct).

"The extension of an exception to a rule should be circumscribed. Otherwise, the exception will swallow the rule. In Respondent's case, the situation was not so chaotic that the duty of courteous and professional behavior should be overridden by the immediate need to maintain order." *Case No. 2015-14171*, p. 13 (Mar. 27, 2017). Here, while Respondents had just pulled over a driver who had been going approximately 107 mph where the maximum legal speed was 55 mph, the situation was under control to an extent that vulgar exclamations cannot be condoned. As such, the Court finds Respondents Guilty.

Respondent Rodriguez's Specification No. 2 and Respondent Nicoletti's Specification No. 1 charge Respondents with using threatening language, namely that Respondents might shoot Individual 1 or Individual 2. The audio portion of the video evidence demonstrates that these threats were made. The graphic and threatening language was accompanied by Respondents' unholstering their weapons. This escalation was highly inappropriate and undermines the good order of the Department as an unprofessional interaction with the public. Accordingly, the Court finds Respondents Guilty.

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***Detaining complainants***

Respondent Rodriguez's Specification No. 5 and Respondent Nicoletti's Specification No. 3 charge Respondents with detaining both complainants. It is undisputed that Respondent Rodriguez entered the vehicle and exercised authority over its occupants by telling them where to drive. He can also be heard on the video stating that the complainants were not free to go. While the detention by the side of the expressway was justified for the traffic offenses, there was no justification for detaining them further and no legal rationale was advanced to explain it. Moreover, Respondent Nicoletti acted together with Respondent Rodriguez in detaining the complainants in this manner by telling him to shoot the complainants if they were to act out of line. Respondent Nicoletti also followed them in the police vehicle off the highway. Accordingly, the Court finds Respondent Rodriguez Guilty of Specification No. 5 and Respondent Nicoletti Guilty of Specification No. 3.

***Abuse of authority***

Specification No. 1 charges Respondent Rodriguez with pointing his gun at Individual 1 and Individual 2. Both complainants stated in their interviews that this occurred. Respondent Rodriguez testified that he at most raised his firearm to ready level, which is approximately a 45-degree angle from the ground.

Although hearsay is admissible in this forum, see Matter of Ayala, v. Ward, 170 A.D.2d 235 (1st Dept. 1991), there are significant reasons for caution in cases like this that present close questions of credibility. The hearsay is central to the CCRB's case, so there is a question of basic fairness in using the hearsay to reach a finding of fact. See Case No. 77005/01, p. 6 (May 27, 2002) (hearsay declarations are insufficient to support findings of

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guilt in cases that pose close questions of credibility). In light of their failure to testify, the unexplained nature of which detracts from their credibility, the Court cannot observe their demeanor, explore possible motives to lie, or assess the credibility of their accounts after the test of cross examination.

On the one hand, the complainants' accounts generally were consistent with each other. Both complainants asserted that Respondent Rodriguez emerged from the patrol vehicle pointing his gun at their car before putting his weapon down. Both complainants also claimed that he aimed the gun at Individual 1 while in the back seat. Respondent Nicoletti advised to shoot the complainants if they caused problems. This makes it more likely that Respondent Rodriguez aimed his weapon at the complainants while in their car.

On the other hand, the Court does not find Individual 1 or Individual 2 credible as a general matter. They engaged in an incredibly dangerous act of speeding at approximately twice the posted speed limit on a crowded highway. While the Court cannot condone Respondent Rodriguez's profanity and threats, he was correct that they could have killed someone. Individual 1 only detracted from his credibility by trying to excuse this by making up a story about his daughter's broken arm.

Finally, Respondent Rodriguez credibly testified that he had his firearm at the ready position: 45 or 50 degrees toward the ground. This is a tactically valid, trainer-taught method of holding a firearm. Respondent is not charged with wrongfully *drawing* his weapon (see Patrol Guide § 221-01, p. 3, note 1).

The Court concludes that the CCRB failed to prove by a preponderance of the evidence that it was more likely than not Respondent Rodriguez pointed his weapon at the

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complainants. As such, the Court finds Respondent Rodriguez Not Guilty of Specification No. 1.

Specification No. 4 charges Respondent Rodriguez with searching [REDACTED] vehicle without sufficient legal authority. The complainants did not actually allege that he searched the vehicle. Rather, it was the CCRB's contention that Respondent Rodriguez's undisputed entry into the car gave him "constructive opportunity to search beyond what was in plain view during that stop." The Court declines to adopt the CCRB's argument that entering a vehicle automatically constitutes a search due to the "constructive opportunity" to keep one's eyes open. As such, Respondent Rodriguez is found Not Guilty.

Specification No. 6 charges Respondent Rodriguez with threatening to issue Individual 1 a summons without sufficient legal authority. Respondent Rodriguez acknowledged that he told Individual 1 that he would issue him a summons in the future if he caught him engaging in similar misconduct. Individual 1 characterized the statement as a threat to look for him and seize upon any potential violation in order to deprive him of a license. The Court sees this as a distinction without a difference. It is a statement of fact that if an individual breaks the law in the future, that individual could be issued a summons or arrested. The Court does not see how this can be actionable misconduct. Accordingly, the Court finds Respondent Not Guilty.

Specification No. 7 charges Respondent Rodriguez with failing to provide his name when asked by Individual 2. Both complainants agreed that Individual 2 asked Respondent Rodriguez to provide his name, and that Respondent Rodriguez ignored the request. As with the specification regarding pointing the firearm, this specification is based completely

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on hearsay. The Court finds no corroboration for it other than the consistency of both complainants. As such, Respondent Rodriguez is found Not Guilty.

Specification No. 8 charges Respondent Rodriguez with seizing [REDACTED] property. It is undisputed that he made Individual 1 call a tow truck company to have his car taken away. In this case, the vehicle could not be seized pursuant to Patrol Guide § 218-19, which requires that the vehicle itself be stolen, lost or involved in an accident or a crime. None of these circumstances apply here. Instead, Respondent Rodriguez deprived Individual 1 of access to his own car pursuant to a traffic stop. He lacked legal authority to do so. Therefore, the Court finds Respondent Rodriguez Guilty of Specification No. 8.

## **PENALTY**

In order to determine an appropriate penalty, Respondent's service record was examined. See Matter of Pell v. Board of Educ., 34 N.Y.2d 222, 240 (1974). Respondents were appointed to the Department on March 1, 2000. Information from their personnel record that was considered in making this penalty recommendation is contained in an attached confidential memorandum. Respondents also submitted several letters of recommendation from supervisors, colleagues, family and friends in support of a favorable penalty.

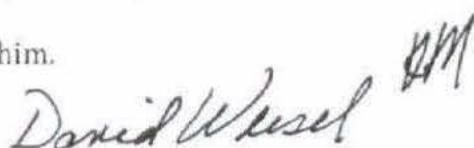
Respondent Rodriguez has been found guilty of the use of profanity, a threat of force, illegal detention, and illegal seizure of property. The CCRB recommended that he forfeit 25 vacation days and serve one year of dismissal probation. Respondent Nicoletti has been found guilty of the use of profanity, a threat of force and illegal detention. The CCRB recommended that he forfeit 20 days.

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Respondents in similar cases involving improper searches, courtesy and abuse of authority have forfeited as many as 25 vacation days. See, e.g., Case No. 2015-14171 (Mar. 27, 2017) (13-year captain with no prior disciplinary history forfeited 25 vacation days for: (i) telling an individual to "Shut the fuck up" in a non-chaotic, routine arrest situation; (ii) pushing said individual in the upper chest without police necessity; (iii) authorizing a strip search of second individual without sufficient legal authority; and (iv) issuing a noise summons to said individual without sufficient legal authority).

The Respondents engaged in serious misconduct here. Most troubling is their threats to shoot the passengers as the result of a car stop, and the detention of the passengers by removing them and their vehicle to an out-of-the-way parking lot, ostensibly for safety reasons. Car stops on the side of highways are not uncommon and there was no need to diverge from proper procedure in this way.

The Court is aware of Respondent Rodriguez's record. In light of the absence of any indication that he will repeat this misconduct, and in light of the positive recommendations from his supervisors, the Court does not see the need to impose a period of monitoring. As such, the Court recommends a penalty of the forfeiture of 25 vacation days for Respondent Rodriguez. Respondent Nicoletti was found Guilty of fewer violations and the Court recommends a forfeiture of 20 vacation days for him.

  
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Respectfully submitted,

David S. Weisel  
Assistant Deputy Commissioner Trials

**APPROVED**

NOV 22 2019

  
JAMES P. O'NEILL  
POLICE COMMISSIONER



POLICE DEPARTMENT CITY OF NEW YORK

From: Assistant Deputy Commissioner Trials  
To: Police Commissioner  
Subject: CONFIDENTIAL MEMORANDUM  
POLICE OFFICER ROBERT RODRIGUEZ  
TAX REGISTRY NO. 926015  
DISCIPLINARY CASE NO. 2018-18541

Respondent was appointed to the Department on March 1, 2000. On his last three annual performance evaluations, he received a 3.0 overall rating of "Competent" for 2016, a 4.0 overall rating of "Highly Competent" for 2015 and a 4.5 overall rating of "Extremely Competent/Highly Competent" for 2014. He has received one medal for Excellent Police Duty and one medal for Meritorious Police Duty.

[REDACTED]

In 2013, Respondent forfeited 25 vacation days for (i) losing his firearm, (ii) carrying his firearm in a clip-on holster and (iii) failing to immediately notify the Department upon discovering the loss of his firearm. In 2019, Respondent forfeited 10 vacation days for (i) returning to his post approximately 36 minutes after his scheduled meal ended, (ii) failing to comply promptly with a supervisor's lawful order to complete the command's vehicle assignment sheet and (iii) entering his end of tour as 0205 hours at approximately 0130 hours. In connection with that matter, Respondent was placed on Level 1 Discipline Monitoring. Monitoring remains ongoing.

For your consideration.

*David Weisel*  
David S. Weisel

Assistant Deputy Commissioner Trials



POLICE DEPARTMENT CITY OF NEW YORK

From: Assistant Deputy Commissioner Trials  
To: Police Commissioner  
Subject: CONFIDENTIAL MEMORANDUM  
POLICE OFFICER THOMAS NICOLETTI  
TAX REGISTRY NO. 925830  
DISCIPLINARY CASE NO. 2018-18534

Respondent was appointed to the Department on March 1, 2000. On his last three annual performance evaluations, he received a 4.0 overall rating of "Highly Competent" in 2017, a 3.0 overall rating of "Competent" in 2016, and a 4.0 overall rating of Highly Competent" in 2015. He has received two medals for Excellent Police Duty.



In 2014, Respondent forfeited five vacation days for failing to bring his copies of summonses or memo book to court, resulting in the dismissal of three cases. In 2018, Respondent forfeited 10 vacation days for (i) failing to properly investigate allegations of an assault, (ii) failing to notify a supervisor about an assault that occurred within his patrol area and (iii) failing to make accurate and concise entries in his activity log.

For your consideration.

David S. Weisel  
Assistant Deputy Commissioner Trials